No. 04-172

SEP 7 - 2004

In The Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, CHASE MANHATTAN BANK, USA, NATIONAL ASSOCIATION, as Indenture Trustees, and DR. BEN S. BRANCH, Chapter 7 Bankruptcy Trustee,

Petitioners,

v.

HSBC BANK USA and JPMORGAN CHASE BANK, as Indenture Trustees,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SARAH L. REID
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
(212) 808-7800

DAVID S. ROSNER
DANIEL ZINMAN
KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP
1633 Broadway
New York, NY 10019
(212) 506-1700

DOUGLAS B. ROSNER
GOULSTON & STORRS, P.C.
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
THOMAS B. COTTON
COOPER & KIRK, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Section 510(a) of the Bankruptcy Code directs the bankruptcy court to enforce subordination agreements under "applicable nonbankruptcy law." Before the Code's enactment in 1978, some federal courts had crafted an equitable bankruptcy rule by which they awarded post-petition interest to a senior creditor only if the subordination agreement expressly allowed such interest. Did this equitable bankruptcy rule survive the Code's command to apply "nonbankruptcy law" to subordination agreements?

2. New York adopted a bankruptcy-only rule governing payment of post-petition interest under subordination agreements. Did the First Circuit err by holding that this bankruptcy-only rule is not "nonbankruptcy law" under Section 510(a) of the Bankruptcy Code?

RULE 29.6 STATEMENT

Respondent HSBC Bank USA, N.A. is wholly owned by HSBC Holdings plc, a publicly-owned company. Respondent JPMorgan Chase Bank is wholly owned by J.P. Morgan Chase & Co., a publicly-owned company.

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BRIEF IN OPPOSITION

Respondents HSBC Bank USA, N.A. and JPMorgan Chase Bank respectfully submit that the petition should be denied. Only two courts of appeals have addressed the primary question of federal law presented here, and they have both agreed that the plain language of the Bankruptcy Code abrogated the pre-Code judge-made equitable Rule of Explicitness governing payment of post-petition interest under subordination agreements. The only disagreement between the First and Eleventh Circuits concerns which rule of New York contract law to apply, an uncommon and unimportant question that was correctly decided below. Moreover, the interpretive issue concerning the proper reading of subordination provisions found to be ambiguous may easily be avoided by clearer drafting. Finally, the decision below is interlocutory; as a result, the dispute between the parties in this case could well be obviated by the fact-finding ordered by the First Circuit on remand.

STATEMENT OF THE CASE

Petitioners' statement omits and misstates information concerning the factual and legal background of this case.

1. A subordination agreement is a contract that ranks the claims of creditors of a common debtor such that a (junior) creditor subordinates his claim to the (senior) creditor's claim. Thus, the debtor must pay the senior creditor in full before it pays the junior creditor anything. Subordination agreements are enforceable in and out of bankruptcy. Pet. 7a. The questions presented in this case – both of which concern whether the senior creditors are

entitled to recover interest accruing after the bankruptcy petition was filed prior to payment of the claims made by junior creditors – arise only in the narrow circumstance where the bankruptcy estate has sufficient assets to pay all of the principal and pre-petition interest due to the senior creditors, but insufficient assets to pay all principal and interest due the junior creditors as well as post-petition interest owed to the senior debt holders.

a. Before Congress enacted the Bankruptcy Code in 1978, the Bankruptcy Act of 1898 did not mention subordination agreements. Pet. 7a. Accordingly, some bankruptcy courts adopted judge-made equitable rules to determine whether subordination agreements would be enforced in bankruptcy. *See, e.g., In re Time Sales Fin. Corp.*, 491 F.2d 841, 844 & n.10 (3d Cir. 1974). In general, these courts concluded that equity demanded enforcement of such agreements because junior creditors, who freely agreed to subordinate their claims, would receive a windfall absent enforcement. *See, e.g., In re Credit Indus. Corp.*, 366 F.2d 402, 410 (2d Cir. 1966).

But these courts also worried that granting *post-petition* interest to senior creditors might confer a windfall upon them. Because interest generally does not accrue on unsecured claims after the debtor files a bankruptcy petition, a creditor may claim only principal and pre-petition interest against the estate. *See* Pet. 8a-9a. If a subordination agreement covered post-petition interest as well, the senior creditor thus would receive (from the junior creditor) more than its allowable claim against the estate. To ensure that both creditors intended this result, these courts crafted an equitable Rule of Explicitness to govern claims for post-petition interest. Under this rule,

which was an exception to the general rule against post-petition interest, these courts interpreted subordination agreements to cover post-petition interest only if an agreement expressly allowed such interest. Pet. 9a; *In re Time Sales*, 491 F.2d at 844. This Court, however, never addressed the rule's validity.

b. The enactment of the Bankruptcy Code in 1978 changed this regime. Unlike the Bankruptcy Act, the Code expressly addressed the treatment of subordination agreements in bankruptcy. Section 510(a) states that subordination agreements are enforceable in bankruptcy "to the same extent that such agreement is enforceable under applicable nonbankruptcy law." 11 U.S.C. § 510(a). Thus, subordination agreements are now enforced in accordance with the statute, not pursuant to judge-made equitable rules.

Petitioners claim that, "[f]or thirty years," courts have consistently recognized and applied the "federal common law canon of contract interpretation known as the Rule of Explicitness." Pet. 2. To the contrary, before the decision below, the question whether Section 510(a) abrogated the ancillary equitable Rule of Explicitness has arisen in only one other court of appeals decision in the quarter century since the Code's enactment. *See Chemical Bank v. First Trust of N.Y. (In re Southeast Banking Corp.)*, 156 F.3d 1114 (11th Cir. 1998). Like the First Circuit in this case, the Eleventh Circuit held that the plain language of Section 510(a) replaced the judge-made Rule of Explicitness with "applicable nonbankruptcy law." The court reasoned that Section 510(a) "cut away the equitable mantle under which the bankruptcy courts had fashioned the Rule of Explicitness." *Id.* at 1122. Further, the court explained that the bankruptcy court may exercise equitable

power only where authorized by the Code, and the Code did not grant that power for enforcing subordination agreements. *Id.* at 1122-23. Thus, the court concluded that the rule "can no longer survive as the progeny of the bankruptcy courts' equity powers or as a federal canon of contract construction." *Id.* at 1124.

At the same time, the Eleventh Circuit recognized that state law, as "applicable nonbankruptcy law," might have a similar interpretive rule, but it could not determine whether New York, whose law governed the agreements, had such a rule. *Id.* The Eleventh Circuit therefore certified the following question to the New York Court of Appeals: "What, if any, language does New York law require in a subordination agreement to alert a junior creditor to its assumption of the risk and burden of the senior creditor's post-petition interest?" *Id.* at 1125. The New York Court of Appeals answered: "In accordance with the Rule of Explicitness, New York law would require specific language in a subordination agreement to alert a junior creditor to its assumption of the risk and burden of allowing the payment of a senior creditor's post-petition interest demand." *Chemical Bank v. First Trust of N.Y. (In re Southeast Banking Corp.)*, 93 N.Y.2d 178, 186, 710 N.E.2d 1083, 1088, 688 N.Y.S.2d 484, 489 (1999). The Eleventh Circuit then held that the subordination agreement at issue did not satisfy this rule and denied the senior creditors' claim for post-petition interest. *Chemical Bank v. First Trust of N.Y. (In re Southeast Banking Corp.)*, 179 F.3d 1307, 1310 (11th Cir. 1999).

2. This case arises from Respondents' right to payment, on behalf of senior debt holders, of post-petition interest. While solvent, the Bank of New England N.A. issued senior and junior debt. Pet. 3a-5a. Petitioners U.S.

Bank and Chase Manhattan Bank, USA, N.A. are indenture trustees for the junior debt holders, while Respondents are indenture trustees for the senior debt holders. Pet. 4a.

After the Bank of New England filed its bankruptcy petition in 1991, Petitioner Ben Branch, the bankruptcy trustee, assumed control of its estate and made three payments to creditors. Pet. 5a-6a. From these payments, the senior creditors recovered their unpaid principal and pre-petition interest, as well as all of their fees and expenses. Pet. 5a-6a. Believing he had paid the senior creditors in full, the trustee proposed to pay $11 million to the junior creditors. Pet. 6a. Respondents objected to the payment on the ground that the subordination agreement entitled the senior creditors to payment of post-petition interest prior to any distribution to the junior debt holders. Pet. 6a.

The bankruptcy court overruled Respondents' objection and authorized the payment. Pet. 34a-41a. Because the indentures have a New York choice-of-law clause, the court held that the indentures do not satisfy the Rule of Explicitness announced in the New York Court of Appeals' *Chemical Bank* decision. Pet. 37a-41a. The district court affirmed on essentially the same grounds. Pet. 22a-33a.

3. The First Circuit vacated and remanded. Pet. 1a-21a. Like the Eleventh Circuit, the First Circuit concluded that Section 510(a) abrogated the pre-Code equitable Rule of Explicitness. Pet. 7a-10a. The court further agreed that state law is the appropriate source of "applicable nonbankruptcy law" in this situation, and thus looked to New York law. Pet. 10a-11a.

The First Circuit, however, held that the New York Court of Appeals' *Chemical Bank* decision is not "applicable nonbankruptcy law" under Section 510(a). Pet. 12a-16a. The court reasoned that *Chemical Bank* announced "a rule of construction *applicable only in bankruptcy*," as "is apparent from its use of the term 'post-petition interest' – a term of art applicable only in bankruptcy." Pet. 15a (quoting *Chemical Bank*, 710 N.E.2d at 1088) (emphasis in original). The court held that New York lacked the authority to create this bankruptcy-only rule, for "section 510(a) does not vest in the states any power to make bankruptcy-specific rules: the statute's clear directive for the use of applicable *nonbankruptcy* law leaves no room for state legislatures or state courts to create special rules pertaining strictly and solely to bankruptcy matters." Pet. 12a (emphasis in original).

The court emphasized the limited scope of its holding: it stands ready to enforce, under Section 510(a), any "interpretive principle" that a state legislature or state court "applies to subordination agreements generally," so long as it is not "a state rule that applies only in bankruptcy." Pet. 16a. This limitation necessarily arises from the express command that subordination agreements be enforced "to the same extent that such agreement[s are] enforceable under applicable *nonbankruptcy* law." 11 U.S.C. § 510(a) (emphasis added).

Accordingly, the First Circuit applied New York's general contract law, and found that the subordination agreements in this case were ambiguous regarding the availability of post-petition interest. Pet. 17a-20a. In accordance with settled New York contract law, the court held that "resolution of this ambiguity requires an inquiry into the parties' intent. That inquiry is fact-based and the

bankruptcy court has not made the necessary findings." Pet. 3a. The court therefore remanded for further proceedings. Pet. 3a.

REASONS FOR DENYING THE WRIT

1. The First Circuit and the Eleventh Circuit are unified on the primary question presented: whether Section 510(a) abrogated the pre-Code equitable Rule of Explicitness. No other court of appeals has even addressed the question, and the two that have done so have decided it correctly. This question therefore does not warrant further review.

a. Section 510(a) gave new statutory authority to the bankruptcy court to enforce subordination agreements. As Petitioners concede, bankruptcy courts enforced subordination agreements before 1978 under their general equitable powers. Pet. 16. Section 510(a), however, directed bankruptcy courts to enforce these agreements only "to the same extent" that they are "enforceable under applicable nonbankruptcy law."

This instruction revoked the bankruptcy court's equitable power to enforce subordination agreements and replaced it with statutory authority to enforce such agreements only to the extent they are enforceable under "applicable nonbankruptcy law." Pre-Code equitable rules ancillary to the enforcement of subordination agreements like the Rule of Explicitness have necessarily been abrogated as well, for they simply are not "applicable nonbankruptcy law." This Court has held that the bankruptcy court possesses only those equitable powers expressly granted by the Code. "[W]hatever equitable powers remain in the

bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). As both the First and Eleventh Circuits recognized, Section 510(a)'s silence on equitable authority not only revokes pre-existing equitable authority, but also rules crafted under it – like the Rule of Explicitness. Pet. 9a (quoting *Norwest*); *Southeast*, 156 F.3d at 1122 (same).

Moreover, Congress knew how to grant equitable authority to the bankruptcy court when it wanted to do so. In Section 510(c), for example, Congress authorized the bankruptcy court to subordinate any claim "under principles of equitable subordination." 11 U.S.C. § 510(c). This subsection "powerfully demonstrates" that when Congress intended to preserve the bankruptcy court's pre-Code equitable powers, it said so expressly. *Southeast*, 156 F.3d at 1123. In this context, "section 510(a)'s command to enforce subordination agreements according to the applicable nonbankruptcy law can only be read as a clear and contemplated break with prior practice." *Id.*

Section 552(b)(1) further illustrates that Congress preserved pre-Code equitable powers in certain specified instances, but not in Section 510(a). Under that section, a lien covering after-acquired property may also cover post-petition proceeds as permitted by "applicable nonbankruptcy law," but the bankruptcy court may exclude such proceeds "based on the equities of the case." 11 U.S.C. § 552(b)(1). This section demonstrates that Congress did not grant any equitable power by the term "applicable nonbankruptcy law." Had that phrase included equitable power, it would not have been necessary for Congress to authorize the court to modify "nonbankruptcy law" based on "the equities of the case" in Section 552(b)(1) – the

phrase "applicable nonbankruptcy law" would have granted such power itself. Given that Section 510(a) does not similarly authorize the court to modify nonbankruptcy law based on "the equities of the case," the court necessarily lacks such power and must follow "applicable nonbankruptcy law."

Petitioners' contrary interpretation would effectively read the words "applicable nonbankruptcy law" out of the statute. Consider, for example, a State that enacts a statute prohibiting entirely the enforcement of subordination agreements. Under the plain language of Section 510(a), subordination agreements governed by the law of such a State would not be enforceable. Yet, Petitioners would have the bankruptcy court continue to enforce such agreements under the pre-Code judge-made equitable rules without regard to the dictates of "applicable nonbankruptcy law."

Having abrogated the pre-Code equitable Rule of Explicitness, Section 510(a) replaces it with state law. The phrase "applicable nonbankruptcy law" may refer to either state or federal law. *Patterson v. Shumate*, 504 U.S. 753, 757, 759 (1992). In this case, all agree, no nonbankruptcy federal statute applies, and in accordance with the usual rule, the interpretation and enforcement of private contracts is committed to state law. *See Volt Info. Scis., Inc. v. Board of Trs.*, 489 U.S. 468, 474 (1989). The First and Eleventh Circuits agree that no distinctive federal interest justifies creating a federal common law of subordination agreements in bankruptcy. Pet. 10a-11a; *Southeast*, 156 F.3d at 1121 n.8. Nor have Petitioners identified any need for a federal rule of decision. Indeed, they have conceded that state law governs subordination agreements outside bankruptcy. Pet. 21-22. Under the plain language of

Section 510(a), state law governs them in bankruptcy as well.

b. Faced with Section 510(a)'s plain text and uniform interpretation in the courts of appeals, Petitioners resort to a negative inference from the absence of legislative history. Under this Court's precedents, they argue, the Code should be interpreted to incorporate prior practice absent an express statement in the Code or its legislative history disavowing pre-Code practice. Pet. 15-18. But Petitioners have overstated the relevance of pre-Code practice, which this Court uses only as an aid to interpret *ambiguous* text. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, . . . reference to legislative history and pre-Code practice is hardly necessary") (internal citation omitted). Because Section 510(a) is unambiguous, the bankruptcy courts' pre-Code practice cannot alter its meaning.

Petitioners cite two cases in which this Court relied upon pre-Code practice, but neither stands for the proposition that a pre-Code, judge-made rule overrides explicit statutory language. Pet. 15 (citing *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494 (1986), and *Kelly v. Robinson*, 479 U.S. 36 (1986)). In *Midlantic*, the Court held that the trustee may not abandon polluted land in violation of state health and safety laws, 474 U.S. at 507, even though the Code empowers the trustee to "abandon any property of the estate that is burdensome." 11 U.S.C. § 554(a). The trustee had lacked this power before the Code's enactment in 1978. Emphasizing that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," the Court concluded that the Code and its history

did not do so. *Midlantic*, 474 U.S. at 501 (citation omitted). In *Kelly*, the Court adhered to this guidance, holding that a criminal restitution order is not dischargeable in a chapter 7 bankruptcy. 479 U.S. at 50. The Court examined the longstanding pre-Code rule against discharging criminal sentences and noted its reluctance to hold that the Code "silently abrogated" this prior practice, particularly given the strong federalism concerns that would arise from bankruptcy court review of state criminal sentences. *Id.* at 44-47; *cf. McElroy v. United States*, 455 U.S. 642, 658 (1982) ("absent a clear statement of purpose from Congress, the Court was unwilling to read a federal criminal statute in a way that would encroach on a traditional area of state criminal jurisdiction").

The Court long ago refuted any suggestion that *Midlantic* and *Kelly* should be read to hold that pre-Code practices can alter the plain meaning of unambiguous Code provisions. In *Ron Pair*, the Court explained that *Midlantic* "did not rest solely, or even primarily, on a presumption of continuity with pre-Code practice." 489 U.S. at 244. Instead, *Midlantic* rested on the conflicts that an unlimited abandonment power would have created with other Code provisions, the "extraordinary" nature of the trustee's claimed power, and national environmental policy. *Id.* Likewise, *Ron Pair* explained that *Kelly* did not rely on a "pale presumption" of continuity with pre-Code practice. *Id.* at 245. Rather, *Kelly* used pre-Code practice as an "aid" to interpret an ambiguous provision against the backdrop of the overriding federal policy against interfering with state criminal proceedings. *Id.* at 244.

More important, *Ron Pair* read *Midlantic* and *Kelly* to limit the use of pre-Code practice as an interpretive tool to cases satisfying two conditions. First, the statutory language

must be "open to interpretation." *Id.* at 245. Second, the case must "involve[] a situation where bankruptcy law, under the proposed interpretation [breaking with pre-Code practice], [is] in clear conflict with state or federal laws of great importance." *Id.* Both *Midlantic* and *Kelly* satisfied these conditions. *Id.* at 244-45. But applying this test in *Ron Pair*, the Court rejected a pre-Code bankruptcy court practice, holding instead that the Code unambiguously authorized a nonconsensual oversecured creditor to claim post-petition interest. *Id.* at 240-42.

This analysis not only harmonizes *Midlantic* and *Kelly* with *Ron Pair*, but also explains later decisions. In *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990), for instance, despite the undisputed pre-Code practice of not discharging criminal sentences in bankruptcy, the Court held that the Code's plain text made criminal restitution orders dischargeable in a chapter 13 bankruptcy. *Id.* at 563-64. Similarly, the Court has declined to consider pre-Code practice where the Code unambiguously allows only the trustee – not a creditor – to recover certain expenses. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10-11 (2000). The *Ron Pair* analysis also accounts for *Dewsnup v. Timm*, 502 U.S. 410, 420 (1992), which followed pre-Code practice to hold that the Code prohibits a debtor from reducing a creditor's lien to its judicially determined value, because the statutory text was ambiguous and the proposed interpretation conflicted with the "basic bankruptcy principles" that a lien passes through bankruptcy and that the debtor should not receive a windfall from a creditor.

Pre-Code practice therefore cannot alter the meaning of Section 510(a) under *Ron Pair*. As these cases demonstrate, pre-Code practice "cannot overcome [the Code's]

language. It is a tool of construction, not an extratextual supplement." *Hartford Underwriters*, 530 U.S. at 10. Where the Code is unambiguous – as in Section 510(a) – the Court's inquiry ends regardless of pre-Code practice. And even if Section 510(a) were ambiguous, it still would be inappropriate under *Ron Pair* to resort to pre-Code practice, given that the First and Eleventh Circuits' interpretation does not conflict with any important state or federal law or policy, much less ones as important as environmental protection and federal-court abstention from state criminal proceedings. In short, despite Petitioners' contrary suggestion, this Court's precedents reinforce the uniform textual analysis of the courts of appeals: Section 510(a) abrogated the pre-Code equitable Rule of Explicitness.

c. While they admit that both First and Eleventh Circuits have rejected their claim, Petitioners assert that "leading authorities have recognized" that the pre-Code Rule of Explicitness "was not displaced by the enactment of Section 510(a)." Pet. 18-19 (citing a treatise, a law review article, and three bankruptcy court decisions). With one arguable exception, however, none of the authorities cited by Petitioners say that Section 510(a) incorporates the pre-Code ~~equitable~~ Rule of Explicitness. Instead, they merely support the uncontroversial proposition that under Section 510(a) subordination agreements continue to be enforceable in bankruptcy, as they were under pre-Code equitable practice. *See, e.g.*, 4 COLLIER ON BANKRUPTCY ¶ 510.03[2] (15th rev. ed. 2003). COLLIER, for example, is agnostic on the question whether the Rule of Explicitness survived enactment of Section 510(a), noting merely what "[s]ome courts" have held. COLLIER, *supra*, at ¶ 510.03[3] & n.14. But the only post-Code decisions it identifies are the

bankruptcy court decision below, the opinions culminating in the Eleventh Circuit's decision in *Southeast*, and *First Fidelity Bank, N.A. v. Midlantic National Bank (In re Ionosphere Clubs, Inc.)*, 134 B.R. 528 (Bankr. S.D.N.Y. 1991), also relied upon by Petitioners.

Only *Ionosphere* even arguably supports the proposition that the pre-Code equitable Rule of Explicitness was codified by Section 510(a), and the court there noted that one might argue that the Rule of Explicitness "is inconsistent with § 510(a)," but held otherwise largely because the parties failed to dispute the point. *Ionosphere*, 134 B.R. at 533-34. This lonely bankruptcy court ruling, made before the First and Eleventh Circuits' uniform rulings that Section 510(a) abrogated the pre-Code equitable Rule of Explicitness, does not create a division in authority warranting this Court's review.*

2. The First and Eleventh Circuits disagree only on the narrow question of whether the bankruptcy-only Rule of Explicitness adopted by the New York Court of Appeals in *Chemical Bank* governs interpretation of subordination agreements as "applicable nonbankruptcy law" under Section 510(a). This shallow conflict over which provision of New York state law applies in these circumstances does not warrant review by this Court because it was correctly decided below, this Court does not ordinarily decide

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* Petitioners point out that the pre-Code decisions by the Tenth, Second, and Third Circuit have not been overruled, *see* Pet. 19, but nor have they been re-affirmed. Simply put, those circuits, as well as all but two of their sisters, have not been presented with the question whether the equitable Rule of Explicitness survived enactment of Section 510(a). The dearth of precedent over the past quarter century on this issue demonstrates that this Court's review is not required – the question simply does not come up very often.

questions concerning which provision of state law governs even where the issue is technically a federal question, the question rarely arises, and it has little practical significance.

a. Under Section 510(a), the bankruptcy court must enforce subordination agreements according to "applicable nonbankruptcy law." This language is not subtle or challenging. *See Patterson*, 504 U.S. at 757-59; *id.* at 766 (Scalia, J., concurring). It directs the court to apply to subordination agreements the law that would apply outside bankruptcy. Because those agreements are contracts, "applicable nonbankruptcy law" is generally applicable state contract law.

In *Chemical Bank*, however, the New York Court of Appeals adopted a bankruptcy-only rule: "In accordance with the Rule of Explicitness, New York law would require specific language in a subordination agreement to alert a junior creditor to its assumption of the risk and burden of allowing the payment of a senior creditor's *post-petition interest demand*." 93 N.Y.2d at 186, 710 N.E.2d at 1088, 688 N.Y.S.2d at 489 (emphasis added). As the First Circuit correctly explained, this rule's bankruptcy-only nature "is apparent from its use of the term 'post-petition interest' – a term of art applicable only in bankruptcy." Pet. 15a.

The New York court further emphasized that its ruling was limited to the context presented by the question certified to it by the Eleventh Circuit. It recognized the Rule of Explicitness only "for purposes of answering this question – in the spirit of comity but also with the usual certification constraints, as well as within the confines of interrelated threshold rulings already made by the Eleventh Circuit." 93 N.Y.2d at 186, 710 N.E.2d at

1087, 688 N.Y.S.2d at 489. By its terms, the rule announced in *Chemical Bank* requires "a heightened degree of clarity only if the effort to enforce [subordination agreements] ar[ises] in bankruptcy rather than in some other context." Pet. 13a. In short, *Chemical Bank* announced a bankruptcy-only rule.

Because the *Chemical Bank* rule applies only in bankruptcy, it cannot be "*non*bankruptcy law" under Section 510(a). To apply a special, bankruptcy-only rule to subordination agreements in bankruptcy court "would go well beyond the intended reach of section 510(a)," which enforces subordination agreements identically in and out of bankruptcy. Pet. 13a. Indeed, even if the bankruptcy-only Rule of Explicitness crafted by the New York Court of Appeals had been enacted by the State's legislature, it still could not govern interpretation of subordination agreements under Section 510(a).

The First Circuit has not, as Petitioners claim, "usurped the authority of the New York Court of Appeals to act as the final arbiter of its own state law." Pet. 14. Instead, it merely interpreted a federal statute according to its plain language, holding that "applicable nonbankruptcy law" does not include laws applicable only in bankruptcy. The court went out of its way to emphasize its deference to the prerogative of the New York Assembly and the New York Court of Appeals to adopt whatever law they see fit with respect to the enforceability of subordination agreements, provided only that such law be applicable generally and not merely in bankruptcy – that is, provided only that it be "applicable nonbankruptcy law." Pet. 16a. This case does not raise any question of federal-state comity, but instead a question of federal statutory interpretation, and a simple one at that.

b. Moreover, the narrow question on which the First and Eleventh Circuits have divided arises very rarely, and rarer still is the case whose outcome is controlled by whether the court applies the Rule of Explicitness. A host of disparate circumstances must converge for the question to matter: (i) the senior and junior creditors of a common debtor must have entered a subordination agreement with language that arguably, though not explicitly, provides for the payment of the senior creditors' post-petition interest; (ii) the agreement must be governed by New York law; (iii) the debtor must file for bankruptcy; (iv) the bankruptcy estate must have enough resources to pay senior creditors their full principal and pre-petition interest, as well as all secured claims, the estate's fees and expenses, and enough additional assets to make the contest between the senior creditors' post-petition interest and the junior creditors' principal and pre-petition interest worth fighting; and (v) at the same time, the estate must not have enough resources to pay both the senior creditors' principal and pre- and post-petition interest and the junior creditors' principal and pre-petition interest in full, thus obviating any dispute. Not surprisingly, this combination of circumstances, each necessary for the question dividing the First and Eleventh Circuits to arise and matter, rarely comes together in a single case – in the quarter century since the Code was enacted, the question has reached a court of appeals only twice, and *Ionosphere* is the only other post-Code case cited by Petitioners that squarely addresses the question.

c. In addition to its rarity, this question also has little practical significance. Petitioners claim that the decision below "threatens to send a tidal wave of uncertainty through the settled financial expectations in [the]

vast sea" of subordination agreements by "throw[ing] into doubt hundreds of billions of dollars worth of bond offerings." Pet. 2, 14. With these calamities looming, one might have expected the Nation's financial press to take some notice of the First Circuit's ruling, but we have been able to find no article in any significant business publication, and Petitioners cite none, informing the investing public of the decision, much less its supposed catastrophic consequences. This silence is telling.

Moreover, the practical implications of the decision for future subordination agreements are virtually nil. Petitioners correctly note that financial-market participants may contract around a legal rule, whether that rule is sound or not. Pet. 23-24. Just so. Going forward, market participants may easily contract around both the First and the Eleventh Circuits' decisions by adding a single unambiguous phrase to their subordination agreements – "including post-petition interest" or "excluding post-petition interest," depending on their intent.

Further, to the extent that some market participants did not consider the issue to be sufficiently important to merit explicit treatment in a subordination agreement, it can hardly be said that their expectations would be frustrated, regardless of which rule of construction is applied. In those rare circumstances, the First Circuit's conclusion in this case – a remand for factual finding to determine whether the parties intended to cover post-petition interest – hardly threatens to convulse the capital markets in this country. This largely academic question, which will affect resolution of a tiny – perhaps null – set of cases, simply does not merit this Court's attention.

3. Finally, the petition is premature because the decision below is interlocutory. The First Circuit did not finally resolve this controversy, but instead remanded for factual findings as to the parties' intent. For more than a century, this Court has "generally await[ed] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of the petition for writ of certiorari); *see also American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967). In this case, it is entirely possible that the parties' dispute over whether the Rule of Explicitness should govern interpretation of the subordination agreements will be unnecessary to resolution of the underlying controversy. If the bankruptcy court finds on remand that the parties did not, in fact, intend for the senior creditors to recover post-petition interest, the parties' disagreement over the applicability of the Rule of Explicitness will not control the outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

SARAH L. REID
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
(212) 808-7800

DAVID S. ROSNER
DANIEL ZINMAN
KASOWITZ, BENSON, TORRES
& FRIEDMAN, LLP
1633 Broadway
New York, NY 10019
(212) 506-1700

DOUGLAS B. ROSNER
GOULSTON & STORRS, P.C.
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
THOMAS B. COTTON
COOPER & KIRK, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600